

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

This matter is before the Court on Plaintiff's Application for Leave to Proceed *in forma pauperis* (#3), filed on January 23, 2015.

BACKGROUND

Plaintiff alleges that Defendant Calderwood violated his First, Eighth, and Fourteenth Amendment rights by bringing false charges against him. The charges resulted in Plaintiff being unjustly placed in solitary confinement.

DISCUSSION

I. Application to Proceed In Forma Pauperis

Plaintiff filed this instant action and attached a financial affidavit to his application and complaint as required by 28 U.S.C. § 1915(a). Reviewing Plaintiff's financial affidavit pursuant to 28 U.S.C. § 1915, the Court finds that Plaintiff is unable to pre-pay the filing fee. As a result, Plaintiff's request to proceed in forma pauperis in federal court is granted.

II. Screening the Complaint

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that

1 are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary
 2 relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),(2).

3 In addition to the screening requirements under § 1915A, pursuant to the PLRA, a federal
 4 court must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is
 5 frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary
 6 relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a
 7 complaint for failure to state a claim upon which relief may be granted is provided for in Federal
 8 Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under Section 1915(e)(2)
 9 when reviewing the adequacy of a complaint or amended complaint.

10 Review under Fed. R. Civ. P. 12(b)(6) is essentially a ruling on a question of law. *See*
 11 *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
 12 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support
 13 of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th
 14 Cir. 1999). In making this determination, the Court takes as true all allegations of material fact
 15 stated in the complaint, and the Court construes them in the light most favorable to the plaintiff. *See*
 16 *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations in a *pro se* complaint are
 17 held to less stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449
 18 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*). While the standard
 19 under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than
 20 mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-1965 (2007). A
 21 formulaic recitation of the elements of a cause of action is insufficient. *Id.*, *See Papasan v. Allain*,
 22 478 U.S. 265, 286 (1986).

23 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
 24 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on legal
 25 conclusions that are untenable (e.g. claims against defendants who are immune from suit or claims
 26 of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful
 27 factual allegations (e.g. fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319,
 28 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

1 **III. Instant Complaint**

2 Plaintiff brings a claim under 42 U.S.C. § 1983 for violations of the 1st, 8th, and 14th
3 Amendments. 42 U.S.C. § 1983 creates a path for the private enforcement of substantive rights
4 created by the Constitution and Federal statutes. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989).
5 In order to state a claim under § 1983, a plaintiff “must allege the violation of a right secured by the
6 Constitution and the laws of the United States, and must show that the alleged deprivation was
7 committed by a person acting under color of law.” *West v. Atkins*, 487 U.S. 42, 48-49 (1988); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). A person acts under “color of law” if he
8 “exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer
9 is clothed with the authority of state law.” *West*, 487 U.S. at 49. A prison official acts under the
10 color of state law when acting in their official capacity. *See Leer v. Murphy*, 844 F.2d 628, 633 (9th
11 Cir. 1988); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

12 **A. First Amendment**

13 Plaintiff alleges that Defendant violated his First Amendment rights by falsifying charges
14 against him that resulted in Plaintiff’s stay in “the Hold.” Plaintiff reports that he was locked in
15 solitary confinement for 23 hours per day for 42 days. During this time, he was bitten by a
16 poisonous spider. He alleges that the Defendant created the false disciplinary report to retaliate
17 against Plaintiff for Plaintiff’s pending lawsuit. He claims that Defendant told Plaintiff that “you’ll
18 know next time not to file no law suits on people’s (sic).” (#13), p. 10.

19 In order to properly plead a retaliation claim under § 1983, a prisoner “must allege that he
20 was retaliated against for exercising his constitutional rights and that the retaliatory action does not
21 advance legitimate penological goals, such as preserving institutional order and discipline.” *Barnett*
22 *v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam) citing *Rizzo v. Dawson*, 778 F.2d 527,
23 532 (9th Cir. 1985). The prisoner must also submit evidence to establish a link between the
24 retaliatory action and the prisoner’s exercise of his or her constitutional rights. *See Pratt v.*
25 *Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). Finally, the prisoner must establish that his First
26 Amendment rights were actually chilled by the retaliatory action. *See Resnick v. Hayes*, 213 F.3d
27 443, 449 (9th Cir. 2002).

1 Plaintiff pleads in his Second Amended Complaint that he was retaliated against for the
 2 filing of a lawsuit. The falsifying of disciplinary charges and the placement of Plaintiff in solitary
 3 confinement constitute retaliatory actions. Plaintiff established the link between the retaliatory
 4 action and the lawsuit through his quoting of Defendant saying “you’ll know next time not to file no
 5 law suits on people’s (sic).” However, Plaintiff does not establish that this retaliatory impact has
 6 chilled his First Amendment rights. He does not describe any interruption in his ability to carry on
 7 his lawsuit or in his willingness to continue with the case. In his Eighth Amendment complaint, the
 8 Plaintiff alleges that he was unable to visit the law library or use the phone during his time in
 9 solitary confinement, but does not allege that these deprivations prevented him from exercising his
 10 First Amendment rights. Therefore, the Court will dismiss Plaintiff’s Retaliation claim with leave
 11 to amend.

12 **B. Eighth Amendment**

13 Plaintiff argues that the falsifying of the disciplinary report and the 42 days he spent in
 14 solitary confinement “for nothing at all” constitute cruel and unusual punishment. Plaintiff claims
 15 that he was unable to go to the law library, vocational class, church, or the chow-hall. He also
 16 claims he was bitten by a poisonous spider and was not given proper medical attention. Prison
 17 officials may only be held liable for injuries due to unsafe conditions of confinement “if they acted
 18 with ‘deliberate indifference to a substantial risk of harm.’” *Antonetti v. Skolnik*, 748 F.Supp. 2d
 19 1201, 1208 (D. Nev. 2010) quoting *Frost v. Agnos*, 152 F.3d 1124 (9th Cir. 1988); *see also Farmer*
 20 *v. Brennan*, 511 U.S. 825, 834 (1994). There is a subjective and an objective element to the
 21 deliberate indifference standard. *Antonetti*, 748 F.Supp. 2d at 1208. First, the deprivation alleged
 22 must be, objectively, ‘sufficiently serious.’” *Id.* quoting *Farmer*, 511 U.S. at 834 (1994). Second,
 23 the prison official “must know of and disregard an excessive risk to inmate health and safety.” *Id.* at
 24 1209 quoting *Farmer*, 511 U.S. at 837.

25 Plaintiff, in his First Amendment complaint, described the Defendant as displaying
 26 “deliberate indifference” to the Plaintiff’s safety. He specifically cites the poisonous spider bite that
 27 he suffered while in solitary confinement that he alleges was not treated for one and a half months.
 28 “[D]eliberate indifference to a prisoner’s serious illness or injury states a cause of action under §

1 1983.” *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). “Denial of medical attention to prisoners
 2 constitutes an eighth amendment violation if the denial amounts to deliberate indifference to serious
 3 medical needs of the prisoners.” *Toussaint v. McCarthy*, 801 F.23d 1090, 1111 (9th Cir. 1986),
 4 abrogated in part on other grounds by *Sandin v. Connor*, 515 U.S. 472 (1995). When a prisoner
 5 alleges that his medical treatment was delayed, he must also allege that the delay in treatment led to
 6 further injury. *Antonetti*, 748 F.Supp. 2d at 1209 citing *McGuckin v. Smith*, 974 F.2d 1050, 1060
 7 (9th Cir. 1992), overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.
 8 1997). Plaintiff does not sufficiently plead a claim for an 8th Amendment violation under § 1983.
 9 Plaintiff alleges that he was “throwing up and in pain.” (#13), p. 9. He does not make any claims of
 10 deliberate indifference to his medical needs: there is no information in the complaint to indicate that
 11 the Defendant specifically knew that he had been poisoned, or that the Defendant declined to
 12 provide him with medical treatment.

13 Plaintiff also argues that his deprivation from social contact through church, time in the yard,
 14 the chow-hall, or vocational class was cruel and unusual punishment in violation of the 8th
 15 Amendment. Though solitary confinement is a serious punishment for an inmate, the deprivations
 16 of trips to the chow-hall, the law library, vocational class, or the yard do not rise to the level of
 17 “sufficiently serious” as prescribed in *Farmer*. Conditions of confinement may be harsh and
 18 restrictive without violating the Constitution. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1991).
 19 Additionally, Plaintiff must establish that Defendant was “deliberately indifferent” to the harsh
 20 conditions of Plaintiff’s confinement. *Wilson v. Seiter*, 501 U.S. 294 (1991). Therefore, the Court
 21 will dismiss Plaintiff’s 8th Amendment claim with leave to amend.

22 C. Fourteenth Amendment

23 Plaintiff cites Ninth Circuit precedent as support for his argument that an unjustified
 24 allegation resulting in a disciplinary action against a prisoner violates due process. *Nonnette v.*
 25 *Small*, 316 F.3d 872, 878-79 (9th Cir. 2002); *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir.
 26 1999). An inmate’s right to procedural due process only arises when a constitutionally protected
 27 liberty or property interest is at stake. *Cepero v. High Desert State Prison*, Case No. 3:12-cv-263-
 28 MMD-VPC, 2015 WL 1308690 at *13 (D. Nev. 2015) citing *Wilkinson v. Austin*, 545 U.S. 209,

1 221 (2005). An inmate does not have a liberty interest related to prison officials' actions that fall
2 within "the normal limits or range of custody which the conviction has authorized the State to
3 impose." *Cepero*, 2015 WL 1308690 at *13 citing *Sandin v. Connor*, 515 U.S. 472, 478 (1995). A
4 prisoner has no right to remain in the prison's general population. *Sandin*, 515 U.S. at 485-86.
5 "[T]he hardship associated with administrative segregation, such as loss of recreational and
6 rehabilitative programs or confinement to one's cell for a lengthy period of time, does not violate
7 the due process clause because there is no liberty interest in remaining in the general population."
8 *Cepero*, 2015 WL 1308690 at *13 quoting *Anderson v. Cnty. of Kern*, 45 F.3d 1310, 1315 (9th Cir.
9 1995). However, "Plaintiff may show a protected liberty interest not by reference to the language of
10 NDOC procedural regulations, but instead by demonstrating that the administrative segregation to
11 which he was subjected rises to the level of 'atypical and significant hardship.'" *Cepero*, 2015 WL
12 1308690 at *13 citing *Sandin*, 515 U.S. at 483-84.

13 To determine if the Plaintiff's removal to solitary confinement constitutes an "atypical and
14 significant hardship," the Court examines: (1) the extent of difference between segregation and
15 general population; (2) the duration and intensity of the conditions confinement; and (3) whether the
16 sanction extends the length of the prisoner's sentence. *Cepero*, 2015 WL 1308690 at *14; *see also*
17 *Sandin*, 515 U.S. at 486-87. "Typically, administrative segregation in and of itself does not
18 implicate a protected liberty interest." *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003).
19 Furthermore, "the decision to hold an inmate in administrative segregation imposes few procedural
20 burdens on prison officials." *Cepero*, 2015 WL 1308690 at *14. A prison official provides
21 adequate due process by "holding an informal, non-adversarial evidentiary hearing within a
22 reasonable time after administrative segregation begins." *Id.*

23 Plaintiff detailed the differences between segregation and the general population in his
24 Amended Complaint: he could not go to the library, go to church, use the phone, or visit the chow-
25 hall. He had to shower and visit the yard in handcuffs. He was kept in his cell for up to 23 hours
26 per day for 42 days. Similar conditions of solitary confinement have been found to weigh in
27 Plaintiff's favor under the first factor. *See Brown v. Oregon Dept. of Corrections*, 751 F.3d 983,
28 988 (9th Cir. 2014) (finding that 23 hours per day of solitary confinement with almost no

1 interpersonal contact for 27 months constituted an atypical and significant hardship). The second
2 *Sandin* factor does not weigh in Plaintiff's favor. Though the Ninth Circuit has held that a two
3 month segregation is sufficient to weigh in Plaintiff's favor, that case revolved around a
4 handicapped prisoner being placed in a non-handicap-accessible housing unit, and is distinguishable
5 from a case involving a normal prisoner being placed in solitary confinement. *Serrano*, 345 F.3d at
6 1078. Forty-two (42) days in solitary confinement is substantially less than that suffered in *Brown*,
7 751 F.2d at 988, where the plaintiff was held in solitary for 27 months, or in *Cepero*, where the
8 plaintiff was segregated for 19 months. Finally, as in *Cepero*, Plaintiff does not allege that the time
9 spent in solitary confinement caused his sentence to be extended. Taken altogether, Plaintiff's
10 claims are insufficient to establish that his time in solitary confinement caused him to suffer
11 "atypical hardship," and therefore he does not establish that he had a liberty interest that demanded
12 due process guarantees. Should he have a liberty interest that demands due process, it appears that
13 due process has been provided. Plaintiff alleges that he met with a counselor after two weeks to
14 discuss the allegations against him, and that the charges were eventually dropped. A 42 day
15 disciplinary process comports with due process as required by the Constitution. See *Toussain v.*
16 *McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990) (holding that review of administrative segregation
17 decision every 120 days "satisfies due process").

18 However, the requirements of *Sandin* do not apply when the disciplinary action is not
19 supported by any evidence. *Nonnette*, 316 F.3d at 878-79. A disciplinary decision that is
20 unsupported by evidence, when made without a fair hearing in which Plaintiff could defend himself,
21 violates due process. *Id.* Plaintiff complains that there was no basis for the Defendant's conclusion
22 to place him in solitary confinement, and that the Defendant was aware that there was no basis for
23 such a conclusion. He claims that the decision to place him in solitary confinement was unjustified,
24 and he makes reference to another official at the prison dismissing the charges the Defendant placed
25 against him. The Plaintiff also indicates that he met with another official after two weeks in solitary
26 confinement, where he was informed of the charges against him. The charges were later dismissed
27 by an unnamed lieutenant. It is unclear from the limited facts presented how the disciplinary
28 process worked in this instance. Plaintiff does not indicate if this was a conversation, a review of

1 his file, or an actual evidentiary hearing. Furthermore, it is unclear when the charges were dropped.
2 The Court cannot determine from the limited facts if the Plaintiff properly states a claim based on
3 the holdings of *Nonnette*. Therefore, the Court will dismiss the Plaintiff's 14th Amendment
4 complaint with leave to amend.

5 If Plaintiff elects to proceed in this action by filing an amended complaint, he is informed
6 that the court cannot refer to a prior pleading in order to make his amended complaint complete.
7 Local Rule 15-1 requires that an amended complaint be complete in itself without reference to any
8 prior pleading. This is because, as a general rule, an amended complaint supersedes the original
9 complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once Plaintiff files an amended
10 complaint, the original pleading no longer serves any function in the case. Therefore, in an
11 amended complaint, as in an original complaint, each claim and the involvement of each defendant
12 must be sufficiently alleged. Accordingly,

13 **IT IS HEREBY ORDERED** that Plaintiff's Application to Proceed *in Forma Pauperis*
14 (#3) is **granted**. Plaintiff shall not be required to pay an initial partial filing fee. However, even if
15 this action is dismissed, the full filing fee must still be paid pursuant to 28 U.S.C. § 1915(b)(2).

16 **IT IS FURTHER ORDERED** that the movant herein is permitted to maintain this action to
17 conclusion without the necessity of prepayment of any additional fees or costs or the giving of
18 security therefor. This Order granting *forma pauperis* status shall not extend to the issuance of
19 subpoenas at government expense.

20 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915(b)(2), the Nevada
21 Department of Corrections shall pay to the Clerk of the United States District Court, District of
22 Nevada, 20% of the preceding month's deposits to Plaintiff's account (inmate #65115), in the
23 months that the account exceeds \$10.00, until the full \$350 filing fee has been paid for this action.
24 The Clerk of the Court shall send a copy of this Order to the Finance Division of the Clerk's Office.
25 The Clerk shall also send a copy of this Order to the attention of the Chief of Inmate Services for the
26 Nevada Department of Corrections, P.O. Box 7011, Carson City, NV 89702.

27 ...

28 ...

IT IS FURTHER ORDERED that Plaintiff's Complaint be **dismissed** without prejudice with leave to amend. Plaintiff shall have until **November 23, 2015** to file an amended complaint correcting the noted deficiencies.

DATED this 20th day of October, 2015.

George Foley Jr.
GEORGE FOLEY, JR.
United States Magistrate Judge